

UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

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UNIVERSAL CITY STUDIOS	:	Civ. 86-7077, 7099
v.	:	UNIVERSAL'S OBJECTIONS
NINTENDO	:	TO NINTENDO'S BILL
	:	<u>OF COSTS</u>

----- X

1. Universal City Studios, Inc. ("Universal") objects to the entire bill of costs, dated July 29, 1986, submitted by Nintendo Co., Ltd. and Nintendo of America, Inc. (collectively "Nintendo"). Both sides were unsuccessful -- Universal losing its appeal (86-7077) and Nintendo losing its cross-appeal (86-7099). Accordingly, no costs should be awarded to either side. (Universal only presses its bill of costs on the cross-appeal if the Court grants Nintendo its costs on the appeal.)

2. In the event the Court grants costs to Nintendo, Universal objects to the following specific items for which Nintendo seeks recovery:

- a. Nintendo seeks \$785.90 for the cost of reproducing twenty copies of photographic exhibits annexed to Nintendo's opening brief. Universal objects to this amount in that:

(i) there is no provision for allowing the cost of photographs annexed to briefs; (ii) these photographs were exhibits below and lodged with the Court as part of the record; and (iii) the photographs contained exclusively textual matter -- chronology charts -- and need not have been appended in any case.

(Copies of these photographs are attached as Exhibit A.)

- b. Nintendo seeks the entire cost of producing its supplementary appendix, \$496.80. Nintendo should be entitled, if at all, only to half that amount in that the appendix relates both to the appeal and the cross-appeal.
- c. Nintendo seeks the entire cost of the statement of facts and other sections of its opening brief which relate both to Universal's appeal and Nintendo's cross-appeal. (At the same time, Nintendo opposes Universal obtaining costs except for legal sections specifically devoted to the cross-appeal -- a clearly inconsistent position.) Nintendo should be entitled, if at all, to half the cost of the pages relating to the appeal and cross-appeal

(the first 40 pages, including statement of facts, table of contents, etc.) -- thus reducing Nintendo's cost of printing by \$313 (40 pages multiplied by one-half multiplied by \$15.65 per page) and its cost of binding by \$64 (40 pages multiplied by one-half multiplied by \$.16 per page multiplied by 20 copies).

Reducing Nintendo's bill of costs by: (a) \$785.90 for the photographs; (b) \$248.40 for one-half the cost of the supplementary appendix; (c) and \$313 for printing the brief and \$64 for binding (for a total reduction of \$1,411.30), Nintendo would be entitled to recover \$1,142.80 on its bill of costs with regard to Universal's unsuccessful appeal (\$2,554.10 less \$1,411.30).

3. As noted above, Universal is not pressing its bill of costs as respects Nintendo's unsuccessful cross-appeal if neither side is permitted costs. In any event, Nintendo's objections to Universal's bill of costs are without merit:

- a. As to Nintendo's lateness objection, Universal sought leave of Court, pursuant to motion, to file one day late. *on Aug 4. - 5 days late*

- b. Universal sought half the allowable costs of printing its two briefs in that the issues on the appeal were also relevant to the cross-appeal and were directed to such cross-appeal as well (e.g., had Universal been successful in urging on its appeal that Universal had a valid trademark in King Kong, Nintendo would have lost its cross-appeal on such grounds). See also the concession at pp. 1-2 of Nintendo's reply brief that the "same extensive factual record" underlay both the appeal and the cross-appeal. Universal is quite at a loss to understand the sworn attestation in the affidavit submitted by Nintendo that the cross-appeal "was limited to narrow legal issues which did not require extensive briefing or citation to the Appendix."
- c. Nintendo's "division" of appendix and brief pages between the appeal and cross-appeal is in any event without foundation. The appendices related both to the appeal and the cross-appeal in a way that cannot be artificially divided up. Indeed, as noted above, Nintendo conceded that the "same extensive factual

record" underlay both the appeal and cross-appeal. Universal therefore properly sought recovery for one-half the cost of 12 necessary copies.* Similarly, Universal properly sought recovery for one-half the cost of its opening brief; again, that brief covers issues that were directly relevant to, and would have been dispositive of, issues on Nintendo's cross-appeal. In addition, Universal's opening brief contains a statement of facts directed both to the appeal and the cross-appeal. (There was no separate or additional statement of facts in Universal's reply brief.)

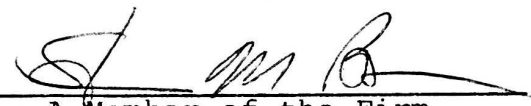
* The affidavit submitted by Nintendo is in error in claiming that Universal is seeking half the cost of 24 copies. Universal only seeks half the cost of 12 copies -- i.e., half of \$3,587 or \$1,793.50, as Universal's bill of costs makes clear. In addition, Nintendo improperly sought to limit Universal's compensation for the appendix to the 90 appendix pages referred to in the legal sections specifically to cross-appeal issues. Apart from the fact that other legal sections also were relevant to the cross-appeal, Nintendo somehow omits the vast bulk of appendix pages which were referred to in Universal's statement of facts. Nintendo's attempt to allocate the number of appendix pages is thus artificial and misguided.

4. Universal respectfully requests that neither side be awarded costs in that both sides were unsuccessful -- Universal on its appeal and Nintendo on its cross-appeal. Should costs be awarded, however, Nintendo's costs should be reduced to \$1,142.80 for the reasons set forth in Paragraph 3. Universal should be awarded the amounts set forth in its bill of costs, dated July 30, 1986 -- \$3,811.62. Balancing Nintendo's bill of costs against Universal's, Universal would be entitled to a net payment from Nintendo of \$2,668.82.

Dated: New York, New York
August 8, 1986

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ

By 

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